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Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION,
Petitioner,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, HARRY MEYERS and JOSEPH S. KLEIN,
Respondents.

October Term, 1922
No. 311

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DEPARTMENT.

RESPONDENTS' BRIEF.

LOUIS R. BICK,
Solicitor for Respondent.

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To be argued by
LOUIS R. BICK.

Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION, Petitioner, vs. FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS, HARRY MEYERS and JOSEPH S. KLEIN, Respondents.	October Term, 1922 No. 311

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DEPARTMENT.

RESPONDENTS' BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court from an order of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Southern District of New York, dismissing the petitioner's bill of complaint upon a motion to dismiss under Equity Rule 29 in an action for infringement of a copyright.

Statement.

The bill of complaint alleges that prior to February 1st, 1873, one Will Carleton wrote a series of poems entitled "Farm Ballads", which contained among other things two certain poems entitled "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse" (Rec., p. 1, fol. 3).

That prior to the 21st day of February, 1873, Will Carleton assigned said series of poems entitled "Farm Ballads" including the two poems aforementioned and his literary properties therein, including all his rights therein and the right to secure copyright therefor, to Harper & Bros.

That on or about the 21st day of February, 1873, Harper & Bros. copyrighted the two poems aforementioned (Rec., p. 2, fols. 3-5).

That within one year before the expiration of the copyright obtained by Harper & Bros. and on the 7th day of January, 1901, Will Carleton filed an application with the Register of copyrights for the renewal of said copyright, and on the 7th day of January, 1901, said copyright was renewed from the 21st day of February, 1901, for a period of fourteen years to and including February 21st, 1915 (Rec., pp. 2-3, fol. 5).

That prior to the expiration of this renewal period and in 1912, *Will Carleton died leaving a will naming Norman E. Goodrich as his sole legatee and nominating him as his executor* (Rec. p. 3, fol. 6).

That within one year before the expiration of the renewal of this copyright, heretofore obtained by Will Carleton, and *three years after the death*

of Will Carleton, Norman E. Goodrich as executor and sole legatee of the Estate of Will Carleton on or about the 21st day of February, 1915, *filed an application for the renewal of said copyright of the said copyright and the said copyright was again renewed from February 21st,* 1915, *for a further period of fourteen years to and including the 21st day of February,* 1929 (Rec., p. 3, fol. 6).

That thereafter and in July, 1915, Norman E. Goodrich died leaving a will in which he made Alice L. Goodrich, his wife, his sole legatee and nominated her as his executrix.

That on the 20th day of October, 1920, Alice L. Goodrich as executrix and sole legatee of the Estate of Norman E. Goodrich, deceased, executed what purported to be an assignment to this petitioner of the sole dramatic copyright of the said poems and by said instrument attempted to give to this petitioner the exclusive right to dramatize the same for production on the stage throughout the world.

The bill further alleges that after the assignment to this petitioner, the defendant Knowles wrote a drama entitled "Over the Hills to the Poorhouse", which tells the story as is related in the poems aforementioned with certain additions, elaborations and modifications and that the other defendants gave public exhibitions thereof without the petitioner's consent and for which alleged infringement petitioner asks for an injunction together with an accounting for profits and damages (Rec., p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

The respondent made a motion to dismiss the bill of complaint pursuant to equity rule No. 29 on the ground that the bill of complaint did not set forth a cause of action.

The District Court dismissed the bill and in its opinion (275 Fed. 852) held in effect among other things, that Will Carleton having died in 1912, three years prior to the expiration of the copyright term, that Norman E. Goodrich, his executor, had no right in 1915 to apply for or secure a renewal of the copyright, and followed the decision in the case of *Silverman* vs. *Sunrise Pictures Co.*, 273 Fed. 909, which held that the opening of the last year of the original copyright, the author could not bequeath the right to apply or secure the renewal or extension of the original copyright. The District Court reached the conclusion:

> *"That neither as legatee or as Executor did Norman E. Goodrich not obtain valid copyright by the action taken by him on or before February 21st, 1915. He, therefore had nothing which he could bequeath to his wife and she in turn conveyed no title to the complainant."*

The Circuit Court of Appeals affirmed the decree of the District Court dismissing the bill on its opinion rendered in *Silverman* vs. *Sunrise Pictures Co., supra* (Rec., p. 25, fol. 65).

POINT I.

The complainant has no valid copyright.

The question, to be determined on this appeal, is, has the petitioner a valid copyright? Respondents contend it has not.

Section 24 of the Copyright Law reads:

> "That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor hereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

In the case at bar Carleton died in 1912, *three years prior to the expiration of the copyright* leaving a will naming Norman E. Goodrich as sole legatee and Executor. In February, 1915, three years after the death of the author, Goodrich, as sole legatee and as Executor, applied for and secured a renewal of the copyright.

Assuming that Norman E. Goodrich as legatee of the author Carleton acquired title to the copyright then existing at the time of Carleton's death, he did not acquire any right of renewal thereof for the reason stated by Judge Hough speaking for the Circuit Court of Appeals in the Silverman case, supra.

> "The author cannot take away the rights of the widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright.
>
> But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

And as Judge Knox said in the instant case:

> "As it was with Mrs. Wilson, so it was with Will Carleton—he died before the open-

ing of year within which the renewal obtained by him could again be renewed."

The Court in the Silverman case further remarked in construing section 24:

> "We construe the section as vesting the right in, or imposing the duty on executors only when the power or privilege of obtaining renewal was existing in the testator-author, at the moment of his decease. This avoids the anomaly of requiring executors as such to do something in respect of a property right not passing by the will appointing them or capable of so passing. It is consequently held here, that since the renewal right did not exist, it was not affected by the will, or the appointment of executors, in short there was a necessary absence of a will in respect to this right, which only came into existence some five years after the testatrix died."

In the present case, *the right,* if it may be called such, *came into existence three years after the testator's death.* Therefore, when Goodrich obtained this renewal of the copyright in 1915, he did not obtain a valid copyright either as legatee or as Executor. That being so, he had nothing to bequeath to his wife, and she in turn had nothing to assign to this petitioner.

Counsel for petitioner argues that the construction placed upon this section by the District Court and the Circuit Court of Appeals is contrary to the legislative intent in the enacting of the said statute and has included in his brief excerpts from the committee reports of Congress.

There is no doubt that the amendment was designed to assist authors and to give them the benefit of the renewal of the copyright, for it often happens that an author for various reasons sells his copyright outright to a publisher for an insignificant sum and the work thereafter proves to be a valuable asset, sometimes beyond the term of the original copyright.

The copyright statute as it is now in force was enacted to enable an author or those who may be dependent upon him to reap the value of his work, but only under certain circumstances. Under the section as it now reads, neither the author nor his assignee possesses any right or power, which may be transferred to run beyond a period of 28 years. When the renewal of the copyright is sought, *a new property right is created,* not in any way dependent upon the previous benefits of the original copyright. *This new property right, however, does not come into being until the beginning of the last year of the original copyright.* Not until then has the author any estate or right which he can bequeth. The right of renewal which is a new property right therefore, was no part of the estate of Will Carleton at the time of his death, and therefore, the renewal right could not pass under his will as he did not possess the same at the time of his decease.

Petitioner argues that if our construction of the statute is correct, that Congress would not have inserted the word "Executor" in this section unless it was intended that the author should have the right to bequeath the renewal right in advance of its accrual. But Congress, we believe, appreciated that an occasion might arise

where the author might die *within the last year* of the copyright without having applied for a renewal and where no widow or children survived him. Under these conditions it gives the Executor the right to obtain the renewal for the benefit of the estate of the author, *as the new property right was in existence at the time of the author's death.*

Petitioner in his brief contends that its construction of the statute is in accordance with the decision in the case of *White-Smith* vs. *Goff*, 187 Fed. 247. A careful examination of the *supra* case will disclose to this court that there is no conflict between that case and the Silverman case, but rather that these two decisions are in harmony.

In the White-Smith case the action was brought by the plaintiff asserting to be the proprietor of certain copyright acquired by it from the author. Prior to the expiration of the original term of the copyright, the complainant as assignee of the author, sought to extend the copyright for a further renewal term of twenty-eight years. The court in that case held that the proprietor was not entitled to the extension or renewal, as the sole right to any such extension or renewal was vested in the author, and was conditional upon his survival, such right only accruing to him within one year prior to the expiration of the original copyright term.

The court said at page 248:

> "Moreover, as is thoroughly settled by the Supreme Court, all rights of copyright in the

> United States are purely statutory, whatever they may once have been in England; and it is not so easy to understand how there can be a vested right under a public statute which has not actually accrued, and which lies only in the future."

It is this proposition that was determined in the case of *Silverman* vs. *Sunrise Pictures Co., supra.* for the Court in that case held that a vested right did not accrue to the author until within one year prior to the termination of the copyright period, and that therefore, there was no estate which could be either bequeathed or devised or could it be taken by his next of kin in the event of intestacy

In the White-Smith case the Court further held that an assignment of the right of renewal made *within* one year prior to the expiration of the original term would have been valid under Section 24 of the Copyright Law. This is in harmony with the Silverman case, and with the contention made by the respondents herein, for if Will Carleton, the author, had continued to live to within one year prior to the expiration of the term of the original copyright, and had during that year either assigned or bequeathed his right to renewal, the same would have been valid. If the author had lived to within the said year, and died during the year, then his Executor would have received an Estate which would have entitled him to exercise the right to renewal.

The determination and opinion of the Courts in these two last cited cases are not inconsistent

and are in accord on the point involved in this case, both as to the legislative intent and as to the construction to be placed upon the statute.

POINT II.

It is respectfully submitted that Section 24 of the copyright Act as construed by the District Court and Circuit Court of Appeals is correct and that the decree should be affirmed with costs.

Respectfully submitted,

Louis R. Bick,
Solicitor for Respondent.

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Supreme Court of the United States.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,
Petitioner,

—against—

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, &c., HARRY MEYERS, and JOSEPH S. KLEIN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICUS CURIAE.

J. JOSEPH LILLY,
Attorney for Sunrise Pictures Corporation,
Amicus Curiae.

THE COURT PRESS—27 West Street—Bowling Green 3620

Supreme Court of the United States.

OCTOBER TERM, 1922—No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF SUNRISE PICTURES CORPORATION AS AMICUS CURIAE.

Statement.

Sunrise Pictures Corporation, being gravely interested in the decision to be made by this Court in the above entitled cause, inasmuch as such determination will control the decision of similar questions by the United States Circuit Court of Appeals for the Second Circuit in the case of *Silverman* v. *Sunrise Pictures Corporation*, to which Circuit Court of Appeals the said Sunrise Pictures Corporation has duly appealed from a final decree perpetually enjoining it from exhibiting or otherwise dealing with a certain motion picture, as *amicus curiae*, respectfully asks consideration of the following points.

BRIEF OF THE ARGUMENT.

POINT I.

The renewal of a copyright is truly an extension of an existing right.

At page 913 of its opinion in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, the Circuit Court of Appeals held to the contrary. Such, however, is the plain intendment of Sections 23 and 24 of the Copyright Law of 1909 and Section 4954 of the Revised Statutes; which, in the Act of 1909, provided for the renewal and extension of existing copyrights, and in the Revised Statutes, for the continuance of the same exclusive rights of copyright.

The Constitution (Art. 1, Sec. 8, Cl. 8) provides for but one "exclusive right to their respective writings" which may be secured "for limited times to authors."

The right so provided for and allowed to be created is singular, the times of its security as Congress deems best, may be plural.

Having adequate jurisdiction in the matter Congress may, as it has, permit an author to assign so much of his "right" as is bounded in point of time by the original period of copyright protection; and having thus, by inducing the public disclosure of what had previously been private literary property, accomplished the primary object of all copyright legislation, "the progress of science and the useful arts," it may with a view to the further accomplishment of the

same high purpose prevent the author from selling or giving away the future periods of an once-obtained copyright until such future period has actually begun, prevent the disinheritance of the author's widow, widower or children until after the commencement of such renewed or extended period and enable the author, if unmarried and childless, to dispose by will, to whomsoever he pleases, of the authorized renewed or extended period of copyright which he might not live to enjoy, or suffer it to go into the possession of such relatives as the law of his domicile selected for the possession of so much of his property as to which he will have died intestate.

Section 24 of the Copyright Law of 1909, quoted at length on page 5 of the respondent's brief, does not disturb the ordinary rules of title and succession to property to the extent decided by the Circuit Court of Appeals in the *Silverman* case. Neither does it create any

> "new right or estate not growing legally out of the original copyright property."
>
> *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909 at p. 911.

If Section 24 actually created in widows, children, executors and next of kin

> "a new estate, not a true extension of the existing copyright" (id., p. 913).

or a

> "new right or estate not growing legally out of the original copyright property" (id., p. 911).

it would be ineffective and void, at least insofar as it gave such "new right or estate" to any other person than the author of a copyrighted work, as violative of the Constitution.

Interpreting the copyright clause of the Constitution (Art. 1, Sec. 8, Cl. 8) in its natural sense (*Gibbons* v. *Ogden*, 9 Wheat, 1 at p. 187, *et seq.*), and remembering that Congress has only those legislative powers which have been accorded to it (*Missouri* v. *Holland*, 252 U. S. 416 at p. 433; *Kansas* v. *Colorado*, 206 U. S. at p. 84; *Houston* v. *Moore*, 5 Wheat, 1 at p. 48) and that the theory of our Government is opposed to the deposit of unlimited power anywhere (*Curry* v. *District of Columbia*, 14 App. D. C. 423 at p. 439; *Board of Education* v. *Minor*, 23 Ohio St. 211, at p. 233), it is utterly impossible to agree with the opinion of the Circuit Court of Appeals in the *Silverman* case.

> "The right of any other person than the author * * * must * * * be a purely secondary and derivative one and in enforcing any alleged copyright such a person must show an exclusive right lawfully derived from the author * * *."
>
> *Yuengling* v. *Schile*, 12 Fed. 97, at p. 100.

How then could the renewal term of copyright, as and when its period commenced, in the case at bar, or in any other case where the author-testator died before the commencement of the statutory year, and the prescribed application was made by his executor, be anything else than an extension of the prior copyright, exclusively residing in the executor of the deceased

author, the only lawful applicant therefor, and legally derived by him from his testator-author?

That other persons, the legatees, might have the right to compel the executor to assign the renewed or extended term to them does not and would not enable them to file the application for renewal which under the statute only the executor could make.

> "The sole object and purpose of the laws which constitute the patent and copyright system is to give the author and inventor a monopoly of what he has written or discovered that no one else shall make or use or sell his rights or his invention without his permission and what is granted to him is the exclusive right, not the abstract right, but the right in him to the exclusion of everybody else."
>
> *In re Bresnahan*, 18 Fed. 62, at p. 64.

To interpret Section 24 as creating a new property right not growing legally out of the original copyright property places Congress in the position of having violated its constitutional powers. To interpret that section according to the natural and unconstrained meaning of its language avoids the necessity of charging Congress with having exceeded its authority, leaves to unmarried and childless authors the unlimited right of bequeathing their prospective renewal terms and accomplishes the result which Congress intended. As between the two constructions there can be no choice save that which favors the constitutionality of the section.

POINT II.

The language of Section 24 of the Copyright Law excludes the idea of any other copyright than the one obtained upon first publication.

The act (Section 24), quoted at length on page 5 of the Respondents' brief, provides for the renewal and extension of a subsisting copyright for such further period "that the entire term shall be equal to that provided for by this act, including the renewal period."

The construction thereof by the Circuit Court of Appeals in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909 at page 913:

> "vesting the right in, or imposing the duty on executors, only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of death"

is clearly at variance with the language of the act, which contemplated one copyright, divided into as many periods as were necessary to permit of there being one

> "entire term * * * equal to that secured by this act, including the renewal period" (§24).

By the language of the act, authors in whose works there were subsisting copyrights were vested with the privilege of extending or renew-

ing their copyrights from the time when the act took effect upon the sole proviso of compliance with the statutory conditions, but they were not vested with any new copyright.

The mere fact that the administrative function of applying for the renewal or extension could not be performed until during the last year of the existing term, did not change the fact of the existence of any copyright or alter the author's privilege of applying for the renewal or extension thereof, but merely delayed the date upon which the will to exercise such privilege could be effectively demonstrated.

Congress could not well have omitted to prescribe the time when application for renewal and extension for which it provided should be made, because without such application having been made prior to "the expiration of the term provided for under existing law" the work would pass into the public domain (R. S. 4953, Copyright Law of 1909, §23).

It would have made no substantive difference in the law if the time for the making of the application had been fixed at one day, or one month, before the expiration of the existing term, or within one year after the taking effect of the Act.

The rights of an author in all matters concerning copyright originate at the publication of his work. The rights of all other takers, recognized by the statute as inheritors of all uninitiated additional periods of copyright protection, originate with the death of the author.

Persons become widows, widowers, executors and next of kin at the time of another's death, and so far as any question of property is con-

cerned their rights as such widows, widowers, executors and next of kin accrue at the time of the death of the person under whom they claim,

> *Cordova* v. *Folgueres Y Rijos*, 227 U. S. 373 at p. 377;
> *Randall* v. *Krieger*, 23 Wall. 137;
> *Seaboard A. L. Co.* v. *Kenney*, 240 U. S. 489;
> *Hutchinson Investment Co.* v. *Caldwell*, 152 U. S. 39;
> *Tillman* v. *Davis*, 95 N. Y. 17;
> *Perryman* v. *Green*, 39 Ala. 133;
> *12 Corpus Juris*, 963,

and not at any other time.

POINT III.

The Circuit Court of Appeals erred in holding, in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, that the executors of a deceased author could not make application for the renewal period unless the privilege of obtaining the renewal was existing in the author at the moment of decease.

The precise interpretation in the *Silverman* case, followed by the Court whose ruling is now under review, is here repeated (p. 913):

> "Result is that we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease."

We have no less difficulty than the petitioner in following the above quoted reasoning of the Circuit Court of Appeals, and beg to submit that the interpretation given to the Statute by that Court is erroneous in that it,

1. divorces authorship from the right to obtain a renewal,

2. interprets into the Statute a provision which its plain language does not warrant.

3. introduces into the copyright system a class of persons who are neither authors nor claimants under authors,

4. defeats the fair, reasonable and just intention of Congress to permit unmarried and childless authors to bequeath their future periods of copyright to persons of their own selection,

5. awards to mere kindred property rights which Congress did not intend that they should have,

6. awards to mere kindred property rights which authors, contemplating death, have willed that others should have.

Congress did not as the Circuit Court of Appeals interpreted the Act by the language quoted at pages 12 and 13 of Petitioner's brief take away anything from authors.

Unless the language of Section 24 of the Copyright Law of 1909 is wholly deceptive, it gave to authors something which they did not have before, viz. a more extended renewal term than that which was authorized by R. S. 4954 and the additional privilege, except where there was a widow, widower or children, of disposing by

will of the right to enlarge the limited time for the duration of the copyrights originally obtained or permit such privilege of enlargement to pass upon their deaths to their relatives by blood.

The reasoning of the Circuit Court of Appeals hereinabove quoted fails wholly when we consider that, as practical men, Congress could not have thought of giving an author the right to bequeath the privilege of applying for the renewal period of a copyright only during the year in which the author himself could file application for it, because, once that year commenced, the reasonable probability would be that the author, himself, would file the necessary application and not leave such important business to be accomplished after his death, the time of which is altogether uncertain and regulated by Higher Authority than any Congressional enactment.

POINT IV.

The Circuit Court of Appeals confused the renewal term and the application to be made therefor.

This was demonstrated by so much of the opinion in the *Silverman* case (273 Fed. 909) as said at pages 912-913:

> "the author cannot take away rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such

> right arises it is—as above stated—a new estate not a true extension of the existing copyright."

The clear language of the Act is that the renewed or extended term may be obtained "at the expiration of the term provided for under existing law" by the author "if still living."

It consequently follows that if the author is dead at the time of the expiration of the term to be "renewed and extended", such "further period" was not actually obtained by him and was therefore neither assignable nor vendible by him, even though he may, within one year prior to the expiration of the term then existing, have filed and registered his application "for such renewal and extension."

Upon an author's death at any time within the so-called statutory year, no less than before the commencement of that year, the prospective renewal term is the property in expectancy of the deceased author's widow or widower, which, under the statute he or she takes, provided, he or she makes the necessary application, as free from the claims of creditors as do the next of kin in the instances where they may inherit.

So also in respect to the inheritance of the renewal term by children.

What Congress deferred by the language of §24 was the time of enjoyment and assignability of the extended term of copyright. It did not deprive the expectant estate of its character as property, but merely withheld from it some, but not all, of the incidents of wholly vested property.

The question is not of a Congressional restraint upon the alienation of the renewal term, as the

Circuit Court of Appeals seemed to think, but of the nature of the estate which Congress raised.

It was within the authority of Congress to withhold renewal terms of copyright in the works of deceased authors entirely from the claims of creditors. It did not add this exemption to a renewal term where no widow, widower or children took and the deceased author had appointed executors of his estate, but this merely serves to emphasize the fact that a renewal term as and when it actually commences, which cannot be at any time before the "expiration of the term provided for under existing law" is part of the estate of the deceased author and truly, just what Congress said it was, a "renewal and extension" of "the copyright subsisting in any work" and not as the Circuit Court of Appeals held "a new estate," or "a property right not passing" (to the executors of a deceased author) "by the will appointing them or capable of so passing."

POINT V.

The interpretation placed by the United States Circuit Court of Appeals for the Second Circuit on Section 24 of the Copyright Act of 1909 in the case of Silverman v. Sunrise Pictures Corporation, 273 Fed. 909, upon the authority of which the above entitled cause was decided by said Court, was wholly erroneous.

Respectfully submitted,

J. JOSEPH LILLY,
Attorney for Sunrise Pictures Corporation,
Amicus Curiae.

Office Supreme Court,
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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 826 311

FOX FILM CORPORATION,

Appellant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), HARRY MEYERS and JOSEPH S. KLEIN,

Appellees.

NOTICE OF MOTION AND PETITION TO ADVANCE.

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

Motion to Advance.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

FOX FILM CORPORATION, Appellant, against FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), HARRY MEYERS and JOSEPH S. KLEIN, Appellees.	#826.

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of SAUL E. ROGERS, verified May 26, 1922, the undersigned will move this court, at a stated term thereof, to be held at the Supreme Court of the United States, Washington, D. C., on the 29th day of May, 1922, at the opening of court on that day, or as soon thereafter as counsel can be heard, for leave to advance the above entitled appeal, on the ground that it involves or affects a matter of general public interest, or in the alternative that the said appeal herein be transferred to the Summary Docket for the first Monday of October, 1922, by reason of the fact that the argument of the appeal herein and the argument of the appeal

in the case of Fox Film Corporation, Appellants vs. Frederick M. Knowles, et al., Appellees, #825, involving the same questions, will not take over one-half hour for the appellant and the same time for the appellees, and for such other and further relief as may be proper in the premises.

Dated, New York, May 26th, 1922.

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

To:
BICK, GODNICK & FREEDMAN, Esqs.,
Attorneys for Appellees,
215 Montague Street,
Borough of Brooklyn,
New York City.

Petition to Advance the Above Entitled Appeal.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

FOX FILM CORPORATION,
Appellant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), HARRY MEYERS and JOSEPH S. KLEIN,
Appellees.

#826.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of SAUL E. ROGERS, attorney for the appellant, respectfully shows and alleges:

FIRST: That this is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the District Court of the Eastern District of New York, dismissing the appellant's complaint in an action for infringement by the appellant against the appellees, in which it was determined that the appellant had no valid dramatic copyright of two poems written by Will Carleton entitled "Over the Hill to the Poorhouse" and "Over the Hill from

10 the Poorhouse," contained in a collection called "Farm Ballads." Upon the authority of *Silverman* vs. *Sunrise Pictures Corporation*, also decided in the Second Circuit (273 Federal Reporter, 909), it was determined that Section 24 of the Copyright Act was construed to be that in the absence of the widow or children the executor had no right to obtain a renewal of the prior copyright, unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of decease.

SECOND: On an application made by the appel-
11 lant for a Writ of Certiorari to this Honorable Court, said writ was duly granted on April 17, 1922, and the return to said writ has been duly filed with the Clerk of this Court on or about May 10, 1922.

REASONS FOR THE ALLOWANCE OF THE MOTION TO ADVANCE.

1. The question is one of great importance to the motion picture industry which is now using dramatic compositions in which the copyright protection is similar to that in this case. By reason of the uncertainty of the law with respect to
12 the renewal of copyrights, producers hesitate to invest large sums of money necessary to produce pictures that may involve the validity as to copyright, when there is such uncertainty as to copyright protection.

2. The question is also of great importance because your petitioner is advised that recently several cases have arisen in the District Courts and

the Circuit Court of Appeals involving the same question, and that these cases are being held up pending the determination of this Court in the instant case. 13

3. The question is of great importance also to authors and dramatists, or their widows and children, or executors, legatees, or next-of-kin, in the numerous cases where the author has not lived to within one year of the expiration of his copyright.

Your petitioner is informed that registration for renewal of copyrights are frequent, and until the law with respect to the renewal of copyrights is settled by this Court, persons who have been heretofore considered by Congress to be the natural recipients and objects of the author's bounty with reference to obtaining the benefits of renewal copyrights, are unable to dispose of such rights until the law with respect to renewal copyrights is settled by this honorable Court. 14

For the above reasons it is respectfully submitted that leave should be granted to advance the above appeal, because it involves or affects some matter of general public interest.

REASONS FOR TRANSFERRING APPEAL TO SUMMARY DOCKET FOR THE FIRST MONDAY OF OCTOBER, 1922. 15

Your petitioner further respectfully submits that in the alternative that leave be granted to transfer the above entitled appeal to the Summary Docket for the first Monday of October, 1922, for the reason that your petitioner, who intends to argue the appeal alone on behalf of the

16 appellant and the appeal in another case, entitled *Fox Film Corporation, Appellant*, vs. *Frederick M. Knowles, et al., Appellees*, #825, involving the same question, will not take up more than one-half an hour in his argument in both cases before this Court, and your petitioner is also advised that counsel for the appellees have stated that they do not expect to take any longer time than one-half an hour in their argument in both cases on behalf of the appellees before this Court.

For the above reasons it is submtited that leave should be granted to advance this appeal to the Summary Docket for the first Monday of October,
17 1922.

WHEREFORE, your petitioner prays that the motion for leave to advance herein be granted, because the appeal involves a matter of general public interest, or in the alternative that the appeal be transferred to the Summary Docket for the first Monday of October, 1922, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

SAUL E. ROGERS,
Petitioner.

18

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.: 19

SAUL E. ROGERS, being duly sworn, deposes and says:

That he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

SAUL E. ROGERS.

Sworn to before me this 26th day of May, 1922. } 20

George Bleich

Notary Public, New York County No. 548
Kings County Register No. 3358;

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Office Supreme Court, U. S.
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WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,
Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEFS AS AMICUS CURIAE.

J. JOSEPH LILLY,
Attorney for
Sunrise Pictures Corporation,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,

Respondents.

Now comes Sunrise Pictures Corporation and moves that upon the annexed petition, the briefs filed on behalf of the parties, and the transcript of the record in the above entitled cause sent to this Court in obedience to its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, its attorney be granted leave to file briefs in this cause as Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,

Respondents.

Sirs:

YOU WILL PLEASE TAKE NOTICE that the foregoing motion will be presented to the Supreme Court of the United States at a session thereof, appointed to be held at the Capitol in the City of Washington, D. C., on Monday, the 13th day of November, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard.

Dated, New York, November 2nd, 1922.

Yours, etc.,

J. JOSEPH LILLY,
Attorney for
Sunrise Pictures Corporation,
Amicus Curiae,
Office & P. O. Address,
50 Pine Street,
Borough of Manhattan,
New York City, N. Y.

To:

SAUL E. ROGERS, Esq.,
Attorney for Petitioner,
Fox Film Corporation,
West 55th Street,
Borough of Manhattan,
New York City, N. Y.

LOUIS R. BICK, Esq.,
Attorney for Respondents,
215 Montague Street,
Borough of Brooklyn,
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,
Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,
Respondents.

On Motion to File Briefs as Amicus Curiae.

Sunrise Pictures Corporation, a corporation of the State of New York, having its principal office and place of business in the Borough of Manhat-

tan, City and State of New York, prays that its attorney be granted leave to file briefs in the above entitled cause, as Amicus Curiae, for the following reasons:

1. The said Sunrise Pictures Corporation is and was the defendant in a certain suit in equity instituted in the United States District Court for the Southern District of New York by Isaac Silverman as complainant on or about January 10th, 1921.

2. In said suit the complainant applied for an injunction restraining your petitioner during the pendency thereof from selling, disposing of or publicly presenting a certain motion picture play entitled "The Price of Silence" upon the ground that such play violated the rights of copyright in a novel entitled "At the Mercy of Tiberius," which the said complainant claimed to own.

3. On February 17, 1921, the said District Court (Hon. Augustus N. Hand, D. J.) by its duly entered order denied said complainant's application and handed down an opinion (reported New York Law Journal, March 1, 1921, p. 1841) which concluded with the following language:

> "I am of the opinion that an act of Congress which lays down a clear method of procedure as to renewal of copyrights where the author left no husband, or wife, or children, and left a will, cannot be interpreted so loosely that the statutory word 'executors' is satisfied, if the owner of a partial equitable interest in the testamentary estate applies for a renewal."

4. On or about February 21, 1921, the said complainant Isaac Silverman, as permitted by Section 125 of the Judicial Code of the United States, appealed from the said interlocutory order to the United States Circuit Court of Appeals for the Second Circuit, which on May 11, 1921, reversed the aforementioned order of the District Court and handed down an opinion in writing which is reported in full at 273 Fed. R. 909.

5. Subsequently to the handing down of the aforementioned opinion the above entitled cause, on appeal from a final judgment and decree, came on to be heard before the said Circuit Court of Appeals and was decided (279 Fed. R. 1018) adversely to the above named petitioner solely upon the authority of the aforementioned opinion in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. R. 909.

6. Thereafter and on or about May 1, 1922, this Court granted its writ of certiorari (66 L. Ed. 483) to review the said determination of the Circuit Court of Appeals for the Second Circuit made in the above entitled cause.

7. On October 18, 1921, the suit of the said Isaac Silverman against Sunrise Pictures Corporation duly came on to be tried and was tried in the United States District Court for the Southern District of New York, which Court (Hon. Augustus N. Hand, D. J.) gave judgment and final decree against your petitioner on November 1, 1921, being controlled in so doing by the aforesaid opinion of the Circuit Court of Appeals in said cause, reported 273 Fed. R. 909.

8. Sunrise Pictures Corporation duly appealed from said final decree and judgment to the United States Circuit Court of Appeals for the Second Circuit, and its said appeal is No. 11 on the calendar of said Circuit Court of Appeals for the October, 1922, term thereof, and because of the pendency of the above entitled cause before the Supreme Court of the United States and the controlling effect which the decision of the Supreme Court therein will have upon the interpretation to be given by all Courts of inferior jurisdiction, to Section 24 of the Copyright Law of 1909, the argument thereof has been adjourned.

9. The questions to be argued and decided in this Court in the above entitled cause are closely similar, in facts almost identical, so far as the interpretation of Section 24 of the Copyright Law of 1909 is concerned, to those which will be presented to and decided by the Circuit Court of Appeals for the Second Circuit upon the aforementioned appeal thereto of the Sunrise Pictures Corporation now pending undetermined before said Court.

10. The attorney for the said Sunrise Pictures Corporation has filed with the Clerk of this Court and served upon counsel for the parties of record to the above entitled cause the required number of copies of the briefs, which it asks leave to file herein, and has endeavored to obtain the consent of such counsel to the filing of its said briefs.

11. Counsel for the respondents has stated that he would consent to the filing of the aforemen-

tioned briefs on behalf of Sunrise Pictures Corporation as Amicus Curiae and would sign whatever consent or stipulation might be necessary.

12. Counsel for the petitioner has not formally objected to the filing of said briefs but has withheld his consent thereto.

13. It is believed that the proposed briefs, so filed as aforesaid, on behalf of the Sunrise Pictures Corporation will be of material assistance to this Court in arriving at a determination of the questions which it discusses, all of which are involved in the above entitled cause and in the aforementioned suit of Isaac Silverman against it, hereinbefore mentioned.

WHEREFORE Sunrise Pictures Corporation submits that it would be meet and proper to grant leave to file the aforementioned brief herein prepared by its counsel as Amicus Curiae and so prays the Court.

All of which is respectfully submitted,

J. JOSEPH LILLY,
Attorney for
Sunrise Pictures Corporation,
Amicus Curiae.

State and County of New York,
Southern District of New York—ss.:

J. JOSEPH LILLY, being duly sworn, says that he is the attorney herein for Sunrise Pictures Corporation, a corporation of the State of New York, on whose behalf the foregoing petition is submitted.

That he has read the said petition and knows the contents thereof and that the same is true of his own knowledge.

J. JOSEPH LILLY.

Subscribed and sworn to before me this
2nd day of November, 1922.

RAYMOND E. MABEN,
Notary Public,
Kings County.
Certificate filed in New York County.

Supreme Court
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922—No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

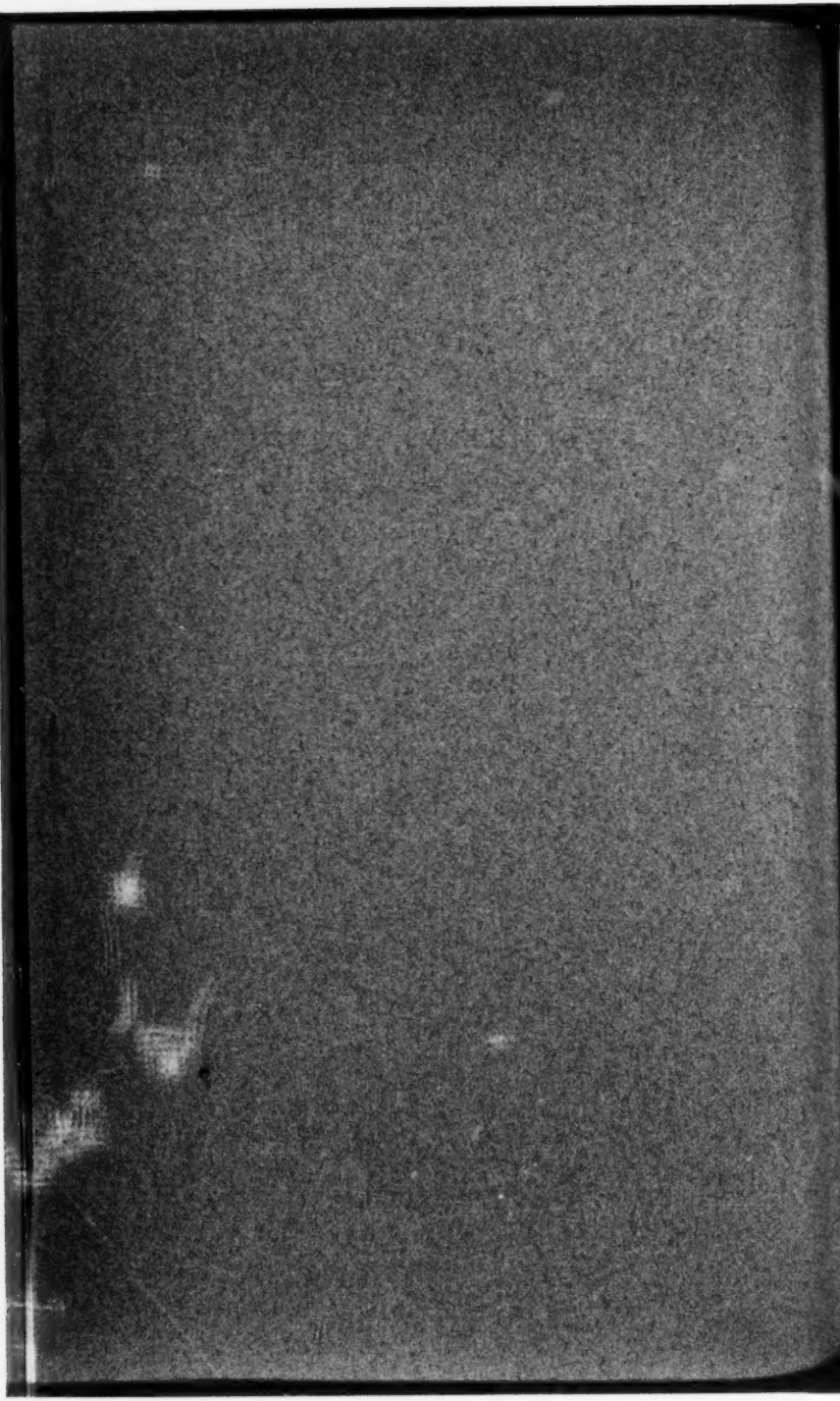
FREDERICK M. KNOWLES, "WILLIAM" C. MCWATTERS, etc., HARRY MEYERS, and JOSEPH S. KLEIN,

Respondents.

REPLY TO BRIEF OF AMICUS CURIAE.

LOUIS B. BICK,
Attorney for Respondent,
215 Montague Street,
Borough of Brooklyn,
City of New York.

Gilbert Press, N. Y. C.



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IN THE

Supreme Court of the United States.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, etc., HARRY MEYERS, and JOSEPH S. KLEIN,

Respondents.

REPLY TO BRIEF OF AMICUS CURIAE.

Statement.

The Sunrise Picture Corporation, claiming to be gravely interested in any decision which this Court may render in this matter, asks consideration by this Court of certain points which it desires to raise in connection with the legal propositions to be determined herein.

It should be borne in mind by this Court that the Sunrise Picture Corporation is the defeated litigant in the case of *Silverman* against the *Sunrise Picture Corporation*, 273 Fed. 909, which decision governed the action of the Circuit Court of Appeals in determining the questions now being reviewed by this Court.

Brief of Argument.

POINT I.

The renewal of a copyright, as provided by Section 24 of the Copyright Law of 1909, creates a new estate.

A great portion of the argument made by *amicus curiae* in its brief, is answered by the brief in chief of the respondent and we feel that it would be but a repetition to again detail our argument on this point. We will therefore, confine ourselves merely to such reply as we feel the brief of *amicus curiae* requires.

A reading of the decision of the Circuit Court of Appeals in the *Silverman* case (*supra*) should convince this Court of the soundness of the reasoning therein contained. To sum up that decision, is in effect to say that the author can acquire no estate or rights in a copyright until the period has arrived which has been designated by Congress as conferring upon him some rights in the premises. We must bear in mind that whatever rights an author may have, or, in fact, even his assignees may have in a copyright, are all statutory. He obtains no greater rights than those which Congress from time to time has given to him.

As to the renewal provided for in Section 24 of the Copyright Law, we find that the right of renewal is not dependent upon the ownership of the original copyright, but is dependent entirely

upon the author of the copyrighted matter himself. As has been the practice for a great many years, an author would, either before copyrighting or after copyrighting, assign all his rights therein to a publishing concern for a very small consideration. The renewal statute was passed not to protect the owner of the copyright, but was merely to permit an author after the time of expiration of the original copyright, to reap the benefits of his own labor, and obtain a renewal for his own benefit. We find that while he may have alienated whatever original rights he may have had to the copyright, still Congress has reinvested him, under certain regulations, with a new estate which would become his upon the happening of a certain event, to-wit: the application for a renewal by him within one year prior to the expiration of the original term of the copyright.

To paraphrase the situation, we may liken the situation of the author of a copyrighted work to the owner of the equity of redemption in mortgaged property. There is reserved to the author, the right to redeem after a certain time and under certain conditions. This right may or may not be exercised by him. His failure to exercise that right, loses for him his equity.

While insisting in certain paragraphs of its brief that the Circuit Court of Appeals erred in holding that Congress created a new estate in favor of the author, *amicus curiae* concedes at page 9 of its brief that Congress "gave to authors something which they did not have before, viz.:— a more extended renewal term than that which was authorized by R. S. 4954."

It is with the latter conclusion that we agree, and upon which theory, no doubt, the question

was determined by the Circuit Court of Appeals.

Under and by the terms of Section 24 of the Copyright Law, the time at which the author obtains this "something" which Congress gave, does not arrive until one year preceding the expiration of the existing term. Therefore, the author not being alive at the time of the vesting of this new right or privilege, no one can claim any benefits thereunder.

Respectfully submitted,

LOUIS R. BICK,
Attorney for Respondent,
215 Montague Street,
Borough of Brooklyn,
City of New York.